IN THE

SUPREME COURT of the UNITED STATES

October Term, 1976

No. 76-779

CITY OF EUCLID, OHIO,
Petitioner,

vs.

JAMES FITZTHUM, et al, and
CHARLES REES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Ohio

PATRICK R. ROCCO
Director of Law,
City of Euclid

HENRY B. FISCHER
Asst. Director of Law,
City of Euclid

585 East 222nd Street
Euclid, Ohio 44123
Phone: (216) 731-6000

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statute and Ordinance

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976
No._____

CITY OF EUCLID, OHIO,

Petitioner,

vs.

JAMES FITZHUM, et al. and
CHARLES E. REES,

Respondents

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Petitioner, the City of Euclid, Ohio, prays that a Writ of Certiorari issue to review the judgments of the Ohio Supreme Court entered on September 10, 1976 and October 8, 1976, dismissing the appeals and overruling Appellant-Petitioner's Motions to Certify the Record to review the decisions of the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District, filed on February 26, 1976 and May 19, 1976, reversing the decision of the Euclid Municipal Court, filed December 31, 1974.

CITATIONS TO OPINIONS BELOW

The Journal Entries of the Ohio Supreme Court are reported at 48 Ohio State Bar Association Report, 1221 (September 20, 1976) and 1416 (October 18, 1976) and are set forth in the Appendix, infra, at page A1. The Journal Entry in the Rees case and the opinion in the Fitzhum, et al. cases of the Court of Appeals for Cuyahoga County, Eighth Appellate District are unreported and set forth in the Appendix, infra, at page A3. The consolidated Journal Entry for these cases of the Municipal Court of Euclid, Ohio is unreported and is set forth in the Appendix, infra, at page A 14.

JURISDICTION

The Judgments of the Ohio Supreme Court were rendered and filed on September 10, 1976 and October 8, 1976. The jurisdiction of the Court is invoked pursuant to Title 28, U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Where all persons, similarly circumstanced as owners of residentially zoned property, are treated alike by a zoning ordinance provision requiring their trucks, house trailers, and recreational vehicles to be stored in garages, but not regulating the storage of their boats, does the failure to regulate storage of boats and other recreational equipment violate the "Equal Protection clause of the Fourteenth Amendment" . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws"?

2. Where all persons, similarly circumstanced as owners of residentially zoned property, are treated alike by a zoning ordinance provision requiring their trucks and recreational vehicles to be stored in garages, but not regulating the storage of their boats, and such ordinance is found to be a constitutional enactment in the furtherance of the public health, safety, morals and general welfare, may a state Court of Appeals declare such ordinance unconstitutional and violative of the "due process" and "equal protection" clauses of the Fourteenth Amendment of the U.S. Constitution as applied, for the following reasons, individually or combined, to-wit:

1) the storage of boats or other recreational equipment is not regulated by such provision; or

2) where there is testimony that the fire and health hazard is greater where sanitary waste and propane gas leaks occur from improperly maintained equipment in a closed garage as compared to the open air from such recreational vehicles (no accident history was evident),

and overturn the conviction of a defendant under such ordinance provision for parking a recreational vehicle (too large in height, width, and length to fit into a garage) in front of or to the side of the garage so as to reduce the open spaces in a residential district? May such state Court of Appeals make a similar finding with respect to a truck used to haul paper trash?

CONSTITUTIONAL AND CITY ORDINANCE PROVISIONS INVOLVED

U.S. Const. Amend. XIV. Sec. 1

. . . ; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

City of Euclid Codified Ordinances, Sec. 1377.06

No person shall park or store any type of truck, trailer, auto trailer or trailer coach in a U1, U2, or U3 USE DISTRICT either on public or private property (including the public streets or highways), excepting to make pickups or deliveries, unless such truck, trailer, house trailer, auto trailer or trailer coach is parked or stored in a completely enclosed structure.

STATEMENT OF THE CASE

Section 1377.06 of the City of Euclid's Codified Ordinances, a Zoning Code provision, was found to be constitutional under the Fourteenth Amendment in the case of City of Euclid vs. Paul (1974), Court of Appeals for Cuyahoga County, Ohio, Eighth Appellate District Case No. 33024, cert. denied June 17, 1974, Ohio Supreme Court Case No. 74-319.

All of the properties of the defendants-respondents are located in residential districts zoned for single or two-family dwelling structures (U1 or U2).

The garages of defendants Fitzhum, Payne, Peattie, Smith and Wisniewski were too small to contain their recreational vehicles. The garages have a 7 foot

high opening.

The trucks, trailers or recreational vehicles of all defendants were stored in their rear yards. Defendant Rees corner lot rear yard is adjacent to and exposed to the street.

All of the recreational vehicles of Defendants Fitzhum, Payne, Peattie, Smith and Wisniewski have the following facilities: toilet and storage tank, running water, stove, refrigerator, and heater operated by propane fuel or electric (battery or gasoline generator). For storage, the propane gas supply should be shut off and the sanitary storage tank should be dumped at an approved dumping ground and disinfectant added.

Defendant Fitzhum's camper trailer (18 1/2 feet long, 8 1/2 feet high and 8 feet wide) was stored beside his detached garage about 45 feet from his house on his lot 40 feet wide and 140 feet deep.

Defendant Payne's camper trailer (21 feet long, 9 feet high and 8 1/2 feet wide) was stored in front of the garage some 50 feet from his house on a lot 60 feet wide and 325 feet deep.

Defendant Peattie's camper trailer (22 feet long, 8 feet high and 8 feet wide) was stored on blocks and jacks on planks 3 feet from his house on a lot 45 feet wide and 112 feet deep.

Defendant Smith's mobile camper (self-propelled)(24 feet long, 10 feet high and 7 1/2 feet wide) was parked or stored in front of his garage about 4 feet from his house on a lot 45 feet wide and 125 feet deep.

Defendant Rees's truck, used for storing and hauling scrap paper could fit into his garage, but he already had another truck stored there. Defendant Rees's truck is actually a commercial type of vehicle.

The defendants were found guilty of parking or storing their trucks or recreational vehicles on residential property other than in a completely enclosed structure, i.e., in a garage, in violation of Section 1377.06 of the Euclid Codified Ordinances.

Upon appeal by the defendants, the Court of Appeals declared the ordinance provision in violation of the "due process" and "equal protection" clauses of the Fourteenth Amendment as applied to the recreational vehicle owners-defendants on February 26, 1976, and discharged such defendants. Thereafter, the Court of Appeals discharged defendant Rees, as well, on May 19, 1976, holding that the "ordinance upon which his conviction was based was declared unconstitutional in companion cases." The Ohio Supreme Court denied jurisdiction upon appeal of the first matter on September 10, 1976, and in the second matter on October 8, 1976.

REASONS FOR GRANTING THE WRIT

I. To Clarify the Standard of Review Applicable to Individual Provisions of a Comprehensive Zoning Ordinance Under the "Due Process" and "Equal Protection" Clauses of the Fourteenth Amendment Where no "Suspect Classification" or "Fundamental Interest" Pertains; Especially Provisions for the Control of Truck, Trailer, Recreational Vehicle, and Camper Storage on Residentially Zoned Property.

The storage of a truck or van used as a recreational vehicle is clearly not an accessory use in a residential district incidental and customary thereto. The indiscriminate storage of such vehicles on residential property has to be prohibited to prevent the very evils that zoning districts and ordinances are created to prevent, e.g., substantial reduction of open spaces; instant trailer camps; instant creation of an additional dwelling unit where zoning prohibits an additional dwelling unit; potential overcrowding; the display of signs on trucks, accessory to commercial uses; intrusion of moving vans, cement mixers and other construction trucks, etc.; conversion of residential property to commercial property; etc.

Recreational vehicles, although increasingly popular, are indistinguishable from trucks for the most part, e.g.: What is the difference between a "Winnebago" van and a moving van? If a moving van (probably safer than a recreational vehicle) is allowed, why not storage of a cement mixer? The fact that the Court of Appeals set aside the Rees case conviction for open storage of a commercial vehicle upon authority of the Fitzhum et al. case where the

vehicle involved is a commercial type truck, fully illustrates how judicial reasoning actually expanded in these matters.

The Euclid ordinance prohibits such storage, but allows an exception if: (1) These vehicles are small enough to fit in the garages that are permitted in residential districts, and (2) The vehicles are in fact stored in such garages. The limitation is much analogous to the "defined" accessory use of "home occupations". An attempt is made by the legislators to be as liberal as possible to home owners without permitting intrusions that defeat the general zoning purposes. For example: A recreational vehicle in a garage is less likely to be used as an extra dwelling unit; the sign on a van in a garage is not displayed in a residential district, thus preventing the opening for all to display signs on their houses; the size and place of the vehicles is limited to permitted sized garages, preventing an opening for moving vans and cement mixers and the like.

The Court of Appeals recognized that it was not dealing with a right so fundamental so that the category is suspect and that the City need not show a compelling state interest to justify classification. See NAACP v. Alabama (1958), 357 U.S. 449, Griswold v. Connecticut (1965), 381 U.S. 479, L.Ed. 2d 510; Shapiro v. Thompson (1969), 394 U.S. 618. They found that equal protection considerations are satisfied "if any state of facts reasonably may be conceived to justify" them. See McGowan v. Maryland (1961), 366 U.S. 420.

Here, all persons similarly circumstanced, i.e., owners of residentially zoned property, are

treated alike: their campers, trucks and recreational vehicles must be stored in a garage while they are not regulated regarding the storage of their boats and certain other recreational equipment. Lindsley v. Natural Carbonic Gas Co. (1911), 220 U.S. 61; F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). The legislature is invested with discretion and does not have to try to deal with an evil or class of evils all within the scope of one enactment, but may approach the remedy piecemeal, learn from experience, and may ameliorate harmful results differently. McDonald v. Board of Elections Commrs. 394 U.S. 802 (1969); Williamson v. Lee Optical Co. 348 U.S. 483 (1955). The enforcement standards are present and no invidious discrimination was even alleged in the instant situation. The case of Yick Wo v. Hopkins, 118 U.S. 356 (1886), where a board of supervisors had arbitrary authority to consent to permit laundry business and such board denied virtually all Chinese such consent, has no application here.

The power to establish districts limited to residential district uses and their accessories is a fundamental component of the power to zone. The principal concern is to protect the residential environment from the intrusion of commercial, industrial, and other uses incompatible with the public health, safety, morals and general welfare. A comprehensive plan, such as is found in the City of Euclid, regulates the uses, the height, and the location of buildings and other structures. It may prescribe setbacks, yard, and percentage of lot occupancy. It has been held that zoning ordinances which exclude commercial and industrial uses from residential districts are substantially related to the

health and safety of the community and serves the general welfare by prohibiting intrusions which change the character of such neighborhoods. See Euclid v. Ambler Realty Co., 272 U.S. 365; Pritz v. Messer, 112 Ohio St. 628; State ex rel, City Ice and Fuel Co. v. Stegner, 120 Ohio St. 418; State ex rel Clifton-Highland Co. v. Lakewood, 41 Ohio App. 9, aff'd 124 Ohio St. 399, cert. den. 285 U. S. 549; Peebles v. State (App.), 25 Ohio L. Abs. 545, dismissed for want of debatable question, 133 Ohio St. 130; Neithamer v. Hayer, 39 Ohio App. 532.

Zoning ordinances commonly establish two or more classes of residential districts, e.g., a single family district, a single and two family district, and multiple dwelling or apartment districts. It has been urged that these distinctions are based solely upon aesthetic purposes. But the courts have upheld the exclusion of apartments from residential districts. While an apartment is not a nuisance, the erection of an apartment in a single family residential neighborhood injures the environment of the detached dwellings, reduces open space, light and air, causes overcrowding, and tends to reduce property values of the single family properties. See Euclid v. Ambler Realty Co., supra; State ex rel Morris v. Osborn, 22 Ohio N.P. (n.s.) 549, 31 O.D.N.P. 197; Village of Belle Terre v. Boraas, 416 U.S. 1.

Key to the protection of residential districts is to forbid uses accessory to uses permitted in another use district. The intrusion of a single family district with uses akin or accessory to a

multi-family or commercial district destroys the character and integrity of the single family district, makes it impossible to determine the actual prime use of residentially zoned properties, creates an atmosphere indistinguishable from the other use districts, makes enforcement of use districts impossible, and thereby tends to utterly frustrate the legitimate and constitutional ends to be accomplished by comprehensive zoning.

In the City of Euclid trailer parks are prohibited and it has been held that such a prohibition is not violative of any constitutional provision, i.e., a city does not have to provide a district for every conceivable use. See Carlton v. Riddell (App.), 58 Ohio Op. 380, 72 Ohio L. Abs. 254, 132 N.E. 2d 772, dismissed for want of debatable question 164 Ohio St. 322, 58 Ohio Op. 103, 130 N.E. 2d 704; State v. Huffman, 20 Ohio App. 2d 263, 49 Ohio Op. 2d 357, 253 N.E. 2d 812; Davis v. McPherson (1955, App.), 58 Ohio Op. 253, 72 Ohio L. Abs. 232, 132 N.E. 2d 626, appeal dismissed 164 Ohio St. 375, 58 Ohio Op. 157, 130 N.E. 2d 794; Perkeray v. Township Committee of Gloucester Tp. (1962), 37 N.J. 232, 181 A. 2d 129, cert. den. and appeal dismissed 371 U.S. 233, 9 L.Ed. 2d 495, 83 S. Ct. 326.

Signs and billboards, although not a direct health hazard, may be prohibited in residential districts, since the erection thereof is not accessory, incidental or customary to such use. See Pace v. Walton Hills, 15 Ohio St. 2d 51, wherein such an ordinance was held unconstitutional only to the extent that political signs were prohibited. It has

been held that signs and billboards may be displayed only as an accessory use to the lawful business conducted on the premises. See Criterion Service, Inc. v. East Cleveland (App.) 55 Ohio L. Abs. 90, 88 N.E. 2d 300, dismissed for want of debatable question 152 Ohio St. 416. See also Cusack Co. v. City of Chicago, 242 U.S. 526 (1917).

Accessory use regulations must be regarded as corollary to fundamental zoning principles and their validity must be so premised. Such regulations cannot be taken in a vacuum, such as provisions in a building code establishing the number of electrical outlets in a room, the type of ventilation required for a furnace or bathroom, the number of toilets in a rooming house, all of which individually bear directly upon health and safety. Zoning law provisions bear directly upon health, safety, morals and welfare in a comprehensive way.

If the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. The evils of overcrowding people, offensive trades, industries, and structures might create nuisances to residential sections and such must, therefore, be controlled. It is a legitimate end to keep areas free of disturbing noises, increased traffic, the hazard of moving and parked automobiles, depriving children of the privilege of quiet open spaces for play. Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also be an ugly sore; a blight on the community which robs it of charm and makes it a place from which men turn. These are the considerations that must be made in judging the constitutionality

of provisions in a comprehensive zoning ordinance. See Euclid v. Ambler Realty Co., supra; Village of Belle Terre v. Boraas, supra; Berman v. Parker, 348 U.S. 26.

It would appear that the legislative discretion of the Euclid Council should prevail, especially since there was a lack of any history of accidents caused by storing recreational vehicles in garages and the defendants were certainly not prejudiced by the lack of regulation of boats and other recreational equipment.

II. To Resolve Conflicts Among State Courts Concerning the Standard or Review of the "Due Process" and "Equal Protection" Clauses of the Fourteenth Amendment Applicable to Individual Provisions of a Comprehensive Zoning Ordinance; Especially Provisions for the Control of Truck, Trailer, Recreational Vehicle, and Camper Storage on Residentially Zoned Property.

On the same facts it has been held that the mere fact that boat owners are not regulated by a comparable ordinance does not make the restriction with respect to recreational vehicles unreasonable or arbitrary. As the New York Court of Appeals asserted in InRe Suddell v. Zoning Board of Appeals of Larchmont, 327 N.E. 2d 809 (1975):

> "Nor do we think that the ordinance is made unreasonable merely because outside storage of boats . . . is not subject to the same permit requirements . . .
> We note that what authorities there are in other jurisdictions are in accord." 327 N.E. 2d 811.

See also Village of Glenview v. Van Dyke, 240 N.E. 2d 354 (Ill. Ct. App. 1968); Connor v. West Bloomfield T.P. 207 F. 2d 428 (6th Cir. 1953); P. & S. Investment Co. v. Brown, 40 Ohio App. 2d 535 (Ohio App. 1974).

Certainly, the same "Fourteenth Amendment" of the U.S. Constitution applies to every state and the same interpretation thereof should everywhere pertain.

CONCLUSION

The within case is of great importance with respect to constitutional law issues and of great public interest. The State Court of Appeals has denied constitutional support to a provision of a comprehensive zoning code prohibiting the storage of trucks and vans in residential districts, except in permitted garages. This decision erodes and renders meaningless the creation of residentially zoned districts, i.e., what good is the authority to create residential districts as authorized by Euclid v. Ambler Realty Co., supra, if commercial accessory uses therein cannot be prohibited or limited?

Today, is not the time to turn our backs on Euclid v. Ambler Realty, supra. The environment and integrity of residential districts needs more protection, if anything, in this day and age where it is questionable as to whether motor vehicles work for people or vice versa.

For the reasons set forth above, it is respectfully prayed that a writ of certiorari be issued as petitioned herein.

Respectfully submitted,

Henry B. Fischer

Patrick R. Roeco
Director of Law, City of Euclid
Henry B. Fischer
Assistant Director of Law
City of Euclid
585 East 222 Street
Euclid, Ohio 44123

Attorneys for Petitioner

PROOF OF SERVICE

The undersigned attorney for the Petitioner hereby certifies that the foregoing Petition for a Writ of Certiorari was served upon all parties by mail (three copies apiece, deposited in a United States Post Office mail box, First Class Postage pre-paid) to Richard R. Hollington, Jr. and Thomas E. Seger of Baker, Hostetler and Patterson, 1956 Union Commerce Building, Cleveland, Ohio 44115, Attorneys for Respondents, Fitzhum, et al., and to Charles E. Rees, 21000 Crystal Avenue, Euclid, Ohio, Respondent, this 7th day of December, 1976.

Henry B. Fischer

Henry B. Fischer
Attorney for Petitioner

APPENDIX

* ORDER OF SUPREME COURT OF OHIO
DISMISSING APPEAL

(Dated September 10, 1976)

No. 76-474

THE SUPREME COURT OF OHIO
The State of Ohio, City of Columbus

CITY OF EUCLID,
Appellant

vs.

JAMES FITZHUM, et al.
Appellees

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

* The order in Ohio Supreme Court Case No. 76-760, City of Euclid, Appellant v. Charles E. Rees, dated October 8, 1976, is identical, except for case number, parties and date.

* ORDER OF SUPREME COURT OF OHIO
OVERRULING MOTION TO CERTIFY
RECORD

(Dated September 10, 1976)

No. 76-474

THE SUPREME COURT OF THE STATE OF OHIO
The State of Ohio, City of Columbus

CITY OF EUCLID,
Appellant

vs.

JAMES FITZHUM, et al.
Appellees.

MOTION FOR AN ORDER DIRECTING THE
COURT OF APPEALS FOR CUYAHOGA
COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

* The Order in Ohio Supreme Court Case No. 76-760, City of Euclid, Appellant v. Charles E. Rees, dated October 8, 1976, is identical, except for case number, parties and date.

IN THE COURT OF APPEALS OF OHIO

CUYAHOGA COUNTY EIGHTH DISTRICT

NO. 34380

CITY OF EUCLID,

Plaintiff-Appellee

vs.

CHARLES E. REES,

Defendant-Appellant

(Dated May 19, 1976)

Motion by appellee for reconsideration overruled. The appellant's conviction was reversed because the ordinance upon which his conviction was based was declared unconstitutional in companion cases which were separately appealed. Under the circumstances, appellant's failure to serve the appellee with a copy of his amended brief, if taken as true, is harmless error. Exc.

Day, P.J., Corrigan, J. concur

/s/ Jack G. Day
Presiding Judge

IN THE COURT OF APPEALS OF OHIO

CUYAHOGA COUNTY EIGHTH DISTRICT

NO. 34380

CITY OF EUCLID,

Plaintiff-Appellee

vs.

JAMES FITZHUM, ET AL.,

Defendants-Appellants

(Dated February 26, 1976)

SYLLABUS

1. Where an ordinance requires specified vehicles and boats to be stored in completely enclosed structures for ostensible health, safety, and public welfare objectives, but the evidence is indisputable that enclosures will not achieve the regulatory aims but tend to compound the ills sought to be corrected, the ordinance violates Due Process of Law.

2. When the sole criterion for the application of an ordinance requiring the enclosure of specified vehicles and boats stored on private or public property is whether or not the vehicles and boats are mounted on trailers, the

classification is arbitrary and unreasonable and the regulation denies Equal Protection of the Law.

DAY, J.,

These cases were consolidated for trial. Each of these defendants was found guilty of violating a Euclid ordinance proscribing the parking or storage of trailers unless parked or stored in enclosed structures. The defendants appeal under a single number and each raises the identical issues on appeal. There are four assignments of error:

"ASSIGNMENT OF ERROR NO. 1:

"The Trial Court erred in finding the defendants guilty because Section 1377.06, as applied to each of the defendants herein, bears no substantial relation to the promotion of the health, safety, morals, and welfare of the citizens of the City of Euclid and, therefore, is unconstitutional as applied."

"ASSIGNMENT OF ERROR NO. 2:

"The Trial Court erred in finding the defendants guilty because Section 1377.06 has been applied by City officials in an arbitrary, unreasonable, and discriminatory manner to defendants and in an unequal and discriminatory manner as between defendants and the owners of other campers, trucks, boats, and other vehicles which fall within the purview of the Section."

"ASSIGNMENT OF ERROR NO. 3:

"The Trial Court committed prejudicial error by directing defendants' expert witnesses to remove themselves from the court room upon defendants' motion for separation of public official witnesses."

"ASSIGNMENT OF ERROR NO. 4:

"The Trial Court committed prejudicial error by denying the defendants the right to cross-examine adverse public official witnesses and by permitting the prosecution to examine these witnesses as on cross-examination."

For reasons assessed below the judgments against the defendants in this appeal must be reversed.

I.

Assignments Nos. 1 and 2 raise the same generic issue —whether Section 1377.06[1] of the codified ordinances of Euclid is constitutional as applied to these defendants. The constitutional claim has two parts. One contention is that the ordinance as applied here has no substantial relationship to health, safety, morals and welfare. The other asserts that the ordinance has been applied to these defendants in an arbitrary, unreasonable and discriminatory manner.

We have had occasion to uphold this same ordinance against a claim of unconstitutionality on its face, *City of Euclid v. Paul* (1974, Ct. of App., 8th Dist., Case No. 33024, Mot. Cert. Den. 1974). However, Assignments of Error Nos. 1 and 2 demonstrate that the current challenge is based on different grounds.

---

1. Section 1377.06:

"No person shall park or store any type of truck, trailer, auto trailer or trailer coach in a U1, U2, or U3 use district either on public or private property (including the public street or highway), except to make pickups or deliveries, unless such truck, trailer, house trailer, auto trailer or trailer coach is *parked* or *stored in a completely enclosed structure.*" (Emphasis supplied)

II.

Five decades ago the Supreme Court of the United States testing another Euclid ordinance set down the general principles for measuring municipal enactments by Federal Due Process Standards:

> ". . . before the ordinance can be declared unconstitutional . . . such provisions [must be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare . . . ."[2] (Brackets supplied)

Approximately six months earlier the Ohio Supreme Court had expressed the same Due Process sentiments in upholding a zoning ordinance against federal and state constitutional attack:

> ". . . If the ordinance discloses no purpose to prevent some public evil or to fill some public need, and has no real or substantial relation to public health, morals, and safety, it must be held void. When, however, legislation does have a real and substantial relation to the prevention of conditions detrimental to the public health, morals, or safety, no matter how unwise the measure itself seems to individual judges, it is not for the judicial tribunals to nullify it upon constitutional grounds." (citations omitted)[3]

---

2. *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 395, 71 L. Ed. 303, 314.

3. *Printz v. Messer* (1925), 112 Ohio St. 628, 639.

III.

It is enough to justify legislative intervention that there is an evil for which legislation may rationally supply a correction.[4]

However, despite wind signs and even some cases to the contrary in other jurisdictions, *Westfield Motor Sales Co. v. Town of Westfield* (1974), 324 A. 2d 113, 119; *People v. Goodman* (1972), 31 N.Y. 2d 262, 266-267, it is still the Ohio rule that zoning restrictions for purely esthetic reasons are unconstitutional.[5] However, it seems both clear and logical that an otherwise valid exercise of the police power need not be a constitutional failure because it incidentally beautifies. Cf. *Lionshead Lake, Inc. v. Wayne Tp.* (1952), 10 N.J. 165, 172, and concurring opinion at 176-77 App. Dism. (1952), 344 U.S. 919, 97 L.Ed. 708.

In determining whether a statute or ordinance satisfies constitutional requisites it is common to find Equal Protection considerations commingled with Due Process issues. Frequently, if not always, police power regulation involves classification. If the process of classifying is unreasonable, there are obvious overlapping considerations of Due Process and Equal Protection. Because the concepts tend to run into each other, they are discussed together.

As a preliminary to that discussion we note that in this case we are not considering a classification involving a right so fundamental that the category is suspect.[6] There-

---

4. *Williamson v. Lee Optical of Oklahoma* (1955), 348 U.S. 483, 488, 99 L. Ed. 563, 572.

5. *Youngstown v. Kahn Bldg. Co.* (1925), 112 Ohio St. 654, 657-658.

6. Cf. *NAACP v. Alabama* (1958), 357 U.S. 449, 460-462, 2 L.Ed. 2d 1448, 1498-1499 (right to association); *Loving v. Virginia* (1967), 388 U.S. 1, 11-12, 18 L.Ed. 2d 1010, 1017-1018; and *Griswold v. Connecticut* (1965), 381 U.S. 479, 485-487, 14 L.Ed. 2d 510, 515-516 (right to family privacy).

fore, the City need not show a compelling state interest to justify the classification.[7] Equal Protection considerations are satisfied "if any state of facts reasonably may be conceived to justify" them.[8] Of course, Equal Protection requires that regulatory legislation regulate impartially, *Yick Wo v. Hopkins*, (1886), 118 U.S. 356, 363-374, 30 L.Ed. 220, 227.

IV.

The vice of the present ordinance is that the record will support neither an application of the ordinance which bears a substantial, and therefore reasonable, relationship to public health, safety, morals or welfare nor the imposition of a taxonomic scheme based on any state of facts that may reasonably justify it. Part of the lack of reasonableness is exposed by evidence of an uneven regulatory application which contravenes the imperatives of the *Yick Wo* case.

A short review of the facts will illustrate the constitutional inadequacies of the ordinance.

The operative element in the enactment is the requirement that trucks, trailers, house trailers, auto trailers, or trailer coaches not be parked in the proscribed zones unless parked or stored in a "completely enclosed structure".[9] The evidence indicates that whatever factors detrimental to public health, safety, morals or welfare inhere in parking the designated vehicles in the open, these factors are not bettered, and may be worsened, by enclosing them.

---

7. *Shapiro v. Thompson* (1969), 394 U.S. 618, 634, 638, 22 L.Ed. 2d 600, 615, 617.

8. Cf. *McGowan v. Maryland* (1961), 366 U.S. 420, 425-426, 6 L.Ed. 2d 393, 399.

9. All the defendants in these appeals owned camper trailers (Tr. 10-20). A claimed truck violation was the subject of a separate appeal.

There was testimony in support of the regulation that a trailer parked in a driveway would interfere with access for fire fighting equipment (Tr. 119, 148, 250, 311), that it would serve as a conduit for fire (Tr. 88, 147, cf. 324), that a trailer was more difficult to move than a car (Tr. 96, 312, 318), that trailers parked in residential areas lowered property values (Tr. 263-264, 275) and, if parked in driveways with attached garages, would extend over the property lines of the houses and create safety hazards by obstructing the view of street traffic (Tr. 306). There was also a rather consistent incidental theme of esthetic detriment running through the testimony of a number of witnesses for the City (see, i.e., Tr. 41, 87, 111, 241, 267, 282).

This evidence standing alone would seem to warrant upholding the ordinal regulation. And, in the light of credibility and fact-finding functions of the trier of the facts (in this case the court) it is no rebuttal of this conclusion to point to conflicting testimony.[10] The responsibility of the judge to determine credibility also disposes of conflicting testimony respecting esthetic considerations (cf. Tr. 242).

Where, then, are the Due Process and Equal Protection vices of the ordinance? They lie in the indisputable fact that enclosing vehicles classified as trailers does not change the fire hazard propensites; does not enlarge health safeguards. Indeed, it is clear beyond peradventure that enclosure may diminish health and safety factors by trapping sewage spillage from portable sanitary facilities (Tr. 335, 349, 350) and collecting highly flammable escaping propane

---

10. The evidence was that automobiles could be conduits for fire (Tr. 90), may be just as difficult to move as trailers if locked (Tr. 250), may impede fire fighting (Tr. 250), cause fire hazards (Tr. 308, 324), and be unsightly when stored outside (Tr. 242).

gas which would otherwise be dissipated in the air (Tr. 333, 348). These are factors too obvious to be resolved on mere credibility determinations. They point up the arbitrariness and unreasonableness of the attempt to regulate. Uncontrovertible evidence also supports the Equal Protection violation in requiring vehicles in the trailer classification to be enclosed. This evidence is to be found in omission of boats from the proscription unless parked on trailers—despite the obvious fact that non-trailer boat parking so decreases mobility that a boat so stationed is a greater safety hazard than one capable of movement on wheels.

This posture of the evidence leads us to conclude that the ordinance as applied contravenes both Due Process and Equal Protection and is void. Assignments of Error Nos. 1 and 2 have merit. Accordingly, the convictions of these defendants are invalid.

V.

Assignment of Error No. 3 travels on the assumption that it is prejudicial error for a trial court to subject expert witnesses to the banishment consequent upon the granting of a motion for a separation of a particular category of witness. In this instance, the defendants' motion to separate all public official witnesses resulted in an order directing all witnesses other than the complaining witnesses and the defendants "to remove themselves and remain out of the hearing of the court until such time as you are called to testify" (Tr. 105-107.)[11] The defense argues but does not demonstrate how this deprivation of the coun-

11. The defense motion was renewed at least twice (Tr. 212-213, 259-260).

sel of its experts, if there was a deprivation,[12] prejudiced it.

The separation of witnesses during trial is a matter within the discretion of the trial court, see *Piening v. Titus, Inc.* (1960), 113 Ohio App. 532, 537. We see no occasion for a different rule for expert witness, cf. *Meyer v. Renner Co.* (App. 1951). 63 Ohio L. Abs. 356, 360, absent a showing which would render the exclusion an abuse of discretion. There is no such demonstration of abuse in this record.

The third assignment of error is without merit.

VI.

Assignment of Error No. 4 is based on the trial court's refusal to allow the defendants to cross-examine public officials responding to defense subpoenas.

No case has been cited or found applying Ohio Revised Code, §2317.07 (as amended) to a criminal prosecution. In any event, the defendants' praecipe did not specify that the witnesses under order were to appear for cross-examination (cf. also Tr. 98).

Of course, the defendants were free to examine the subpoenaed officials as on cross had they shown themselves entitled to the advantages of one of the exceptions to the rule that a party may not cross-examine his own witness.[13] They did not.

The fourth assignment of error is without merit.

12. There is no showing that out of court counseling was unavailable or, if available, was limited in its usefulness by the experts' inability to actually hear the City's witnesses.

13. E.g., hostitlity, surprise, *State v. Gaines* (1974), 40 Ohio App. 2d 224, 229-230 or bias or unwillingness to testify on the part of the public officials, 3 Wigmore §774 (Chadbourn Rev., 1970).

The judgments below are reversed and the defendants in this appeal discharged.

Krenzler, C.J., Jackson, J., concur

(See Krenzler, C.J.'s, Concurring Opinion)

Krenzler, C.J., concurs.

I concur in the judgment of reversal based on the particular ordinance involved and the evidence presented. This does not mean that a municipality does not have the right under its police powers to regulate storage of vehicles other than automobiles in residential areas. However, the legislative enactment must be based on health, safety, morals, or public welfare objectives. Further, the government agency has the burden of proving a violation of the ordinance by competent evidence.

EUCLID MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

CITY OF EUCLID	)	
	)	
vs.	)	OPINION OF THE COURT
	)	
JAMES FITZHUM	)	Case no. 117714
LYNDALE PAYNE	)	Case No. 117724
WILLIAM PEATTIE	)	Case No. 117725
WILLIAM SMITH	)	Case No. 117730
ROBERT WISNIEWSKI	)	Case No. 117734
CHARLES REES	)	Case No. 118870

(Filed December 31, 1974)

These cases came on for trial on December 26, 28 and 30, 1974, the City of Euclid being represented by the Prosecutor and City Law Department, defendants Fitzhum, Payne, Peattie, Smith and Wisniewski being represented by counsel and defendant Rees representing himself. The cases arose from Complaints and Warrants sworn to the Zoning Commissioner of the City of Euclid alleging violations of Euclid Codified Ordinance 1377.06 regarding the illegal parking of trailers and trucks in residential zones.

All defendants are the owners and/or occupiers of premises situated in residential zones within the City of Euclid wherein said violations occurred. Defendants

Fitzthum, Payne, Peattie, Smith, and Wisniewski were the owners of camping trailers and/or a mobile home, defendant Rees the owner of a pickup truck.

The Court finds that by virtue of the case of *City of Euclid vs. Robert M. Paul,* 8th District Court of Appeals, Case No. 33024 (unreported) (February 25, 1974) (Motion to Certify Record overruled by Ohio Supreme Court, June 17, 1974) the Codified Ordinance of the City of Euclid No. 1377.06 is constitutional on its face.

The Court further finds that there is a relation between said ordinance and public safety, to wit: For fire fighting and safety purposes the Fire Chief of the Euclid Fire Department indicates that he needs at least eleven feet (11 ft.) alongside a structure to maneuver fire ladders and that nothing should be parked alongside, near, or within eleven feet (11 ft.) of any structure, otherwise would limit firefighting ability. Also, the Euclid Police Department has indicated that camping trailers parked to the front of the premises can block the view and create a safety hazard. Defendants in the within cases all had their trailers parked less than eleven feet (11 ft.) from an adjoining structure.

The Court further finds that there is a relationship between ordinances and the general welfare by virtue of testimony which indicated that the parking of a trailer or truck in a person's yard can adversely affect the saleability of surrounding real estate.

The Court further finds a relationship between said ordinance and esthetic considerations considering that the parking of a trailer and/or truck on urban lots is unsightly to neighbors and the public in general.

The Court further finds as to defendant Rees specifically by virtue of the case of *Euclid vs. Ambler Realty Company* at 272 U.S. 365 that a municipality has a constitutional right to enact zoning regulations. The City of Euclid has, therefore, properly divided the City into zones for residential, commercial, and industry. A truck is a commercial vehicle intended primarily for commercial use. The rationale follows that if cities have a right to zone use areas they likewise have a right to limit the use of commercial equipment in residential areas. Therefore, the limit of the use of the truck in residential areas to loading or unloading or being otherwise completely enclosed is a proper exercise of the police power.

All defendants have failed to comply with the provisions of said ordinance.

Campers are good people, they are not criminals. A person assisting the Boy Scouts of America is likewise performing a worthy cause. However, ordinances of the City of Euclid are to be complied with and the defendants have failed to comply with the provisions of said ordinance.

This Court as a matter of dictum sincerely hopes that the City Council will reevaluate the campers' plight and perhaps give some further consideration to a modification of Euclid Codified Ordinance 1377.06.

Therefore, as all defendants have beyond a reasonable doubt failed to comply with the terms and provisions of said ordinance, they should each be found guilty of the violation of said ordinance as charged.

Supreme Court of the United States

October Term, 1976

No. 76-779

CITY OF EUCLID, OHIO,
Petitioner,

vs.

JAMES FITZTHUM, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENTS IN OPPOSITION

RICHARD R. HOLLINGTON, JR.
THOMAS M. SEGER
BAKER, HOSTETLER & PATTERSON
1956 Union Commerce Building
Cleveland, Ohio 44115
(216) 621-0200
Counsel for Respondents

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes and Rules

Supreme Court of the United States

October Term, 1976
No. 76-779

CITY OF EUCLID, OHIO,
Petitioner,

vs.

JAMES FITZTHUM, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether, where the record evidence establishes that a municipal ordinance, as applied, is arbitrary and unreasonable and bears no substantial relation to the promotion of the public health, safety, morals, or general welfare and that the ordinance has been enforced in a discriminatory manner, the ordinance is unconstitutional as applied.

CONSTITUTIONAL AND STATUTORY PROVISIONS OMITTED FROM PETITIONER'S BRIEF

Ohio Constitution, Art. XVIII, Section 3:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

28 U.S.C., Section 1257(3):

> *State courts; appeal; certiorari*
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

COUNTERSTATEMENT OF THE CASE

A. Introduction

On December 8, 1976 the City of Euclid (hereinafter "Petitioner") petitioned this Honorable Court to review through a Writ of Certiorari two decisions of the Court

of Appeals of Ohio for the Eighth Appellate District, *Euclid v. Fitzthum*, and *Euclid v. Rees*. This Brief in Opposition addresses solely Petitioner's attempt to obtain review of the *Fitzthum* decision.*

Euclid v. Fitzthum is a criminal prosecution of five of Petitioner's residents, James Fitzthum, Lyndale Payne, Robert Wisniewski, William Peattie, and William Smith, under Section 1377.06 of Petitioner's Codified Ordinances which establishes a comprehensive ban on the outdoor parking of all trailers and similar vehicles within residential areas of Petitioner. The five Respondents were cited under this provision for parking their familys' recreational camping vehicles outside their homes in their backyards or on their driveways. The Euclid Municipal Court found the Respondents guilty of violating Section 1377.06 but the Court of Appeals reversed, holding the ordinance unconstitutional as applied in their five cases. The Ohio Supreme Court, finding the case to be neither of any great or general public interest nor to present any substantial constitutional questions, refused to review this decision. Since, as will be demonstrated herein, no substantial federal question is raised by this matter, this Court, like the Ohio Supreme Court, should also refuse to review this action.

B. Facts

Since Section 1377.06 had previously been held to be constitutional on its face, see *City of Euclid v. Paul*, (Ct. of App., 8th Dist., Case No. 33024, Feb. 14, 1974; *motion*

---

*The Respondents in *Fitzhum* object to Petitioner's attempt to couple their case with the *Rees* case and to obtain review in both matters through the single Petition which Petitioner has filed. As Petitioner's review of the history of these cases indicates, these two cases were separately considered by the Ohio Court of Appeals and the Ohio Supreme Court and no basis exists for the consolidation of them herein.

to certify denied, June 17, 1974), Respondents defended their citations in this action on the ground that the ordinance was unconstitutional *as applied to their specific circumstances*. Their position, in brief, was that the ordinance, *as applied to each of them,* was unreasonable and arbitrary and bore no substantial relation to the promotion of the health, safety, morals, or general welfare of the citizens of the City. Consistent with this defense, an extensive factual record concerning all of the details of the operation and parking of the recreational vehicles by each of the individual Respondents was developed at trial. Since this detailed record is the entire basis for the decision of the Court of Appeals, it is necessary to set forth the facts adduced at trial more fully than Petitioner has.

1. Euclid Zoning Commissioner

Petitioner presented its case in chief through its Zoning Commissioner who testified that after observing a recreational vehicle parked outside in the backyard of each of the Respondents, he swore out affidavits charging each of them with a violation of Section 1377.06. The Commissioner also described the procedures he used in enforcing the ordinance and the types of vehicles which fall within the scope of the provision. In this regard he noted that *boats on trailers are governed by the ordinance* but that *boats off trailers and vans and campers licensed as station wagons are not covered.* He also acknowledged that in one case his own records demonstrated that a citizen had been authorized to park a truck outside behind his garage in open violation of the ordinance. When asked how the ordinance promoted the public health, safety, morals, or general welfare, the Zoning Commissioner stated only that he believed that the ordinance promoted aesthetic interests by curbing "sight pollution."

2. The Individual Respondents

Each of the individual Respondents testified concerning the type of recreational vehicle they own and the location of their vehicle on their property. As would be expected, this testimony was quite detailed. Respondent Payne testified, for example, that his lot in Euclid is 60′ x 325′ and that he parks his travel trailer approximately 50′ behind his home and 5′ in front of his garage. At this location the trailer is approximately 125′ in front of his rear property line and 30′ and 20′ from the two side property lines. Respondent Peattie testified, contrary to Petitioner's representation of the record, that he parks his vehicle to the rear of his house beside his garage some 40′ behind his house and 6′ to 8′ from his garage. All of the other Respondents testified in a similar manner about the parking in their backyards of their campers. In addition, they each described the apparatus and appliances in their vehicles and stated that none of them had ever had fires or vermin in the campers when parked as described. They added that their campers are always locked when parked and that no one has ever slept in them nor have any children ever played in them when they are parked in their respective locations. Respondent Payne also testified that in April 1974, the month in which he and the other Respondents were cited for violating the ordinance, he counted "at least 35 trucks" and two or three campers parked outside in the parking lot of a housing complex which Petitioner owns and operates.

3. Expert Witnesses

A substantial body of expert testimony was also adduced at trial concerning the impact of the location of each of the five Respondents' vehicles on the public health, safety, morals, and general welfare. A Cleveland Fire

Department Captain testified that, based upon his examination of the location of each of the five vehicles, no fire hazards were presented by their parking. A technical expert familiar with the mechanical devices and systems found in Respondents' recreational vehicles testified that no health or safety dangers were presented by the vehicles as parked, but that a serious safety problem involving asphyxiation or explosion would result if the vehicles were parked in an enclosure as required by Section 1377.06. This was due to the fact that the enclosure would trap and hold exhaust fumes generated by the operation of the appliances in the vehicles and sewer and propane gas from the sanitary systems and propane tanks on the campers. A recognized urban planning expert testified that he could identify no positive impact on the public health, safety, morals, or general welfare which would result from moving the individual Respondents' five vehicles from their present locations and placing them in enclosures. He also testified that he is thoroughly familiar with the typical zoning provisions in communities in the Cleveland area which govern the parking of recreational vehicles and that these ordinances generally treat such vehicles as common *residential accessory uses*. He added that Section 1377.06 is, to his knowledge, the most restrictive provision of this sort in Cuyahoga County. Finally, a real estate appraisal expert testified that none of the five vehicles, as parked, would have any affect on the appraisal value of the real estate in the neighborhoods in which the Respondents reside.

4. Public Officials

A number of public officials, including the Mayor and two City Councilmen, also testified. The Mayor stated that the original purpose of Section 1377.06 was to prevent people from living in trailers in the City. He acknowledged, however, that Section 1373.01(22) of the City's ordinances, which had been subsequently adopted, prohibited living in trailers in the City and thus expressly accomplished the purpose of Section 1377.06. The Mayor also made it clear that the reason for enforcing the ordinance was to promote aesthetic interests. One of the Councilmen who was called acknowledge agreeing with the statement by a fellow Councilman that Section 1377.06 promoted only aesthetic interests. He also testified that Section 1377.06 did not cover boats not stored on trailers. A second Councilman, who was called by Petitioner, testified that the only objection to the parking of the Respondents' vehicles he could see was an aesthetic one. He added that he had investigated liberalizing Section 1377.06 and would like to have the City consider revising it.

5. Rebuttal Witnesses

Petitioner, in rebuttal, called a number of witnesses to try to relate the enforcement of Section 1377.06 to the legitimate ends of the police power. However, none of this rebuttal testimony was applicable to the circumstances attending the parking of the five individual Respondents' recreational vehicles.

A Euclid Police Captain testified, for example, that the Police Department's only complaint about recreational vehicles occurred when people were living in them and that a safety problem might be presented if a recreational vehicle was parked in front of the building line on a street. Since all of the Respondents' vehicles are parked in their backyards and since no one has ever slept or lived in any of these vehicles when parked in the City, this testimony was irrelevant. The Euclid Fire Chief testified that a number of fire fighting problems might arise if a recreational vehicle was parked in a driveway between

two homes. He added that fires might be likely to start in recreational vehicles because campers are frequently equipped with propane tanks. The Fire Chief's concern about vehicles parked in a driveway was wholly irrelevant to the Respondents' situations, however, since none of the Respondents' vehicles are parked in a driveway between two homes. Moreover, on cross-examination, the Chief testified that there had not been a fire in a camper or recreational vehicle in Euclid in the 50's, 60's, or 70's and that there had never been a propane fire in the City to his knowledge. He added that if a fire were to occur in a recreational vehicle, it would be preferable to have the vehicle outside rather than in an enclosure because if the vehicle were enclosed, the fire would take longer to discover and, in all likelihood, would spread to the enclosure, thereby becoming larger.

On this record, and particularly the evidence which established that, in Respondents' cases, the legitimate ends of the police power would be harmed rather than promoted by requiring the enclosure of their vehicles, the Court of Appeals held Section 1377.06 to be unconstitutional as applied.

REASONS FOR DENYING THE WRIT

Introduction

In seeking to persuade this Court to accept this case for review Petitioner makes the identical argument it made to the Ohio Supreme Court in its unsuccessful attempt to convince that Court to exercise its discretionary jurisdiction. Petitioner's argument, in brief, is that *Fitzthum* somehow undercuts the right of a municipality sustained in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), to

adopt comprehensive zoning legislation which establishes residential and other use districts within a city. Petitioner reaches this somewhat staggering conclusion by arguing that *Fitzthum* authorizes conducting commercial activities within residential areas of the City. Petitioner asserts, for example, that:

> The Court of Appeals has denied constitutionality support to a provision of a comprehensive zoning code . . . which erodes and renders meaningless the creation of residentially zoned districts, *i.e.*, what good is the authority to create residential districts . . . if commercial accessories therein cannot be prohibited or limited. (P. 14).*

Using what might be characterized as, at best, "expansive reasoning," Petitioner predicts that *Fitzthum* will most certainly lead to:

> instant trailer camps; instant creation of an additional dwelling unit where zoning prohibits an additional zoning dwelling unit; potential overcrowding; the display of signs on trucks, accessory to commercial uses; intrusion of moving vans, cement mixers and other construction trucks, etc.; conversion of residential property to commercial property, etc. (P. 7).

Unfortunately, nothing even approaching "commercial activities" is involved in this case. Similarly, this case does not concern prohibitions on signs, billboards, cement mixers, or trailer parks. To the contrary, as demonstrated above, this case concerns only five families who park their own camper vehicles in their own backyards. Moreover, no unique or novel issue of federal law is presented by this decision. Rather, this case involves nothing more

---

*Reference to Petitioner's Petition is abbreviated throughout as "P. .....".

than the application of the well-settled principle that zoning measures, as applied, must be reasonable and must bear a substantial relation to the promotion of the legitimate ends of the police power to withstand constitutional scrutiny. Certainly there is nothing novel about this legal principle and nothing in the Court of Appeals' application of it in this case which places any limitation on a municipality's ability to adopt comprehensive zoning legislation. For these reasons, this case is not one which merits review by this Court.

1. No Substantial Federal Question Is Presented Herein.

In order to warrant review through a Writ of Certiorari it is well settled that a state court decision must present a substantial federal question for resolution. See *Herb v. Pitcairn,* 324 U.S. 117 (1945). No issue of this sort is presented in this case.

The only aspect of this case which Petitioner may point to *as even involving* a federal question is the standard to be applied in determining whether a specific zoning provision is constitutional *as applied.* Seizing upon this, Petitioner suggests that this Court should take this matter for review so that it may clarify, in some manner which Petitioner fails to express, this standard as applied to zoning regulations governing the parking of recreational vehicles. Apparently Petitioner is suggesting that some special standard of review be established for zoning provisions governing campers.

This justification for reviewing this case is patently without merit. In the first place, the standard for reviewing the constitutionality of a state or municipal body's exercise of the police power is well settled and needs no clarification. The rule is well established that a regu-

lation enacted pursuant to the police power which does not involve "suspect classifications" or "fundamental interests" must, in order to withstand Due Process and/or Equal Protection scrutiny, be reasonable and non-arbitrary and must promote in a substantial manner the legitimate ends of the police power, specifically the public health, safety, morals, and general welfare. *Nebbia v. New York,* 291 U.S. 501, 525-529 (1934). Since zoning ordinances are but one type of regulation enacted in the exercise of the police power, this standard has long been applied in determining the constitutionality of such provisions. *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Curtiss v. Cleveland,* 170 Ohio St. 127 (1959); *Pritz v. Messer,* 112 Ohio St. 628 (1925); *State ex rel. Stulbarg v. Leighton,* 113 Ohio App. 487 (Hamilton Cty. 1959).

Moreover, it is quite apparent that this is the standard the Court of Appeals applied in this case and that, on the record before it, the Court's application of this standard was correct. The Court of Appeals described the test it was applying as follows:

> Five decades ago the Supreme Court of the United States testing another Euclid ordinance set down the *general principles for measuring municipal enactments by Federal Due Process Standards*:
>
> ". . . before the ordinance can be declared unconstitutional . . . such provisions [must be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. . . ."
>
> Approximately six months earlier the Ohio Supreme Court had expressed the same Due Process sentiments in upholding a zoning ordinance against federal and state constitutional attack:

> ". . . If the ordinance discloses no purpose to prevent some public evil or to fill some public need, and has no real or substantial relation to the public health, morals, and safety, it must be held void." (Emphasis added) (P. A6-A7)

The Court analyzed the facts in the record before it under this standard as follows:

> The vice of the present ordinance is that the record will support neither an application of the ordinance which bears a substantial, and therefore reasonable, relationship to public health, safety, morals or welfare nor the imposition of a taxonomic scheme based on any state of facts that may reasonably justify it. Part of the lack of reasonableness is exposed by evidence of an uneven regulatory application which contravenes the imperatives of the *Yick Wo* case.
>
> A short review of the facts will illustrate the constitutional inadequacies of the ordinance.
>
> The operative element in the enactment is the requirement that trucks, trailers, house trailers, auto trailers, or trailer coaches not be parked in the proscribed zones unless parked or stored in a "completely enclosed structure". The evidence indicates that whatever factors detrimental to public health, safety, morals or welfare inhere in parking the designated vehicles in the open, these factors are not bettered, and may be worsened, by enclosing them.
>
> * * * * *
>
> Where, then, are the Due Process and Equal Protection vices of the ordinance? They lie in the indisputable fact that enclosing vehicles classified as trailers does not change the fire hazard propensities; does

> not enlarge health safeguards. Indeed, it is clear beyond peradventure that enclosure may diminish health and safety factors by trapping sewage spillage from portable sanitary facilities (Tr. 335, 349, 350) and collecting highly flammable escaping propane gas which would otherwise be dissipated in the air (Tr. 333, 348). These are factors too obvious to be resolved on mere credibility determinations. They point up the arbitrariness and unreasonableness of the attempt to regulate. Uncontrovertible eviden e also supports the Equal Protection violation in requiring vehicles in the trailer classification to be enclosed. This evidence is to be found in omission of boats from the proscription unless parked on trailers—despite the obvious fact that non-trailer boat parking so decreases mobility that a boat so stationed is a greater safety hazard than one capable of movement on wheels.
>
> This posture of the evidence leads us to conclude that the ordinance as applied contravenes both Due Process and Equal Protection and is void. Assignments of Error Nos. 1 and 2 have merit. Accordingly, the convictions of these defendants are invalid. (P. A9-A11)

It is difficult, if not impossible, to discern what substantial federal question arises for resolution from this well-reasoned application of this long-settled standard to the facts of this case. Indeed, Petitioner offers no suggestion as to any federal question which is presented other than its unspecific assertion that the standard the Court of Appeals applied might somehow be clarified. How this might be accomplished or why this is necessary Petitioner does not explain. Certainly no basis exists for promulgating a new standard of review which would be applicable only to zoning legislation regulating the parking of camp-

ing or recreational vehicles. If this were done, the only result would be a proliferation of standards of review for as many types of activities as are presently governed by zoning legislation. Such a development could only lead to uncertainty and unnecessary confusion in the law.

One matter which is clear from the Court's opinion is that Petitioner has both totally misunderstood and misrepresented the Court's Equal Protection analysis in its statement of the questions it alleges are presented for review. The Equal Protection infirmity which the Court found in Section 1377.06 arises from the arbitrary nature of a regulatory scheme which *covers boats on trailers but excludes boats not on trailers,* the latter obviously presenting a greater safety hazard. Presumably Petitioner's misrepresentation is explained by its misunderstanding.

2. The Court of Appeals Correctly Applied Ohio Law Relating to a Municipality's Exercise of the Police Power in Holding Section 1377.06 Unconstitutional As Applied.

Petitioner's second suggested reason why this Court should accept this case for review—namely, to give the Court an opportunity to resolve "conflicts among state courts concerning the standard of review applicable to individual provisions of zoning ordinances"—hardly merits comment since the resolution of conflicts *between state courts* is not and has never been a basis for the issuance of a Writ of Certiorari. 28 U.S.C., Section 1257(3) specifically sets out the circumstances in which a state court decision may be reviewed by a Writ of Certiorari and a conflict between state courts is not one of the conditions specified in this statute. This argument does underscore a second basis for denying the Writ requested, however,

since it highlights the fact that the Court of Appeals' decision is based in large part on Ohio law.

In Ohio Article XVIII, Section 3 of the Ohio Constitution, the so-called "police power" provision, is the source of the authority of municipal bodies to enact zoning regulations. Naturally the scope of the police power varies from state to state depending upon the exact text of the state constitutional or statutory provision which vests the police power in municipalities and the interpretive gloss the state's courts have placed upon the grant or exercise of this power. In Ohio, for example, Article XVIII, Section 3 places certain definite limitations on its exercise, namely that no action taken in the exercise of it shall contravene any "general laws" of the state.

A further example of the variation which exists in the latitude allowed in the exercise of the police power is the extent to which aesthetic considerations may be used to support zoning regulations. In some states, New York for example, the courts have held that zoning which promotes only aesthetic interests is sufficiently related to the legitimate ends of the police power to withstand constitutional challenge. *See, In Re Suddell v. Zoning Board of Appeals of Larchmont,* 327 N.E.2d 809 (N.Y. 1975). The courts of Ohio, on the contrary, have consistently held that a zoning provision which promotes only aesthetic interests is not sufficiently related to the promotion of the police power granted under the Ohio Constitution to sustain an interference with private property rights. *See, e.g., Youngstown v. Kahn Bldg. Co.,* 112 Ohio St. 654 (1925); *State, ex rel. Killeen Realty Co. v. City of East Cleveland,* 169 Ohio St. 375, 383 (1959); *State, ex rel. Srigley v. Woodworth,* 33 Ohio App. 406 (Athens Cty. 1929); *Smith v. Troy,* 18 Ohio L. Abs. 476 (C.A., Miami Cty. 1934). The rationale for this position was eloquently

stated in *Youngstown v. Kahn Bldg. Co., supra,* at 661-662 as follows:

> It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard impractical as a standard for use restriction upon property. The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power. We are therefore remitted to the proposition that the police power is based upon public necessity, and that the public health, morals, or safety, and not merely aesthetic interest, must be in danger in order to justify its use.

Obviously the Court of Appeals' decision in this case was based upon and reflects this well-settled principle of Ohio law. Since this Court has repeatedly stated that it will not review state court decisions based upon adequate and independent non-federal grounds, even where a federal question is involved, *Berea College v. Kentucky,* 211 U.S. 45, 53 (1908); *Murdock v. Memphis,* 87 U.S. 590, 634-636 (1874), the state law element of the Court of Appeals' decision is another reason why this Court should not grant review.

3. There Are No Special or Important Reasons for Review of This Case by This Court.

Rule 19 of the Rules of Supreme Court of the United States provides, in part, that:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

As demonstrated above, this case is not one which involves any federal question of substance which has not heretofore been decided by this Court nor was the decision below in any way not in accord with applicable decisions of this Court. In addition, Petitioner has presented no other special or important reasons for review by this Court and none exist. Indeed, the unique nature of this case weighs heavily against the issuance of the Writ Petitioner seeks.

As noted above, this case was tried on the theory that Section 1377.06 was unconstitutional *as applied* to each of the individual Respondents. Because of this, an extensive factual record was developed in the trial court. As is apparent from the decision itself, the Court of Appeals' holding was based solely upon this detailed factual testimony. The facts which make up this record are in many respects unique and little likelihood exists that a similar case will ever arise elsewhere. Review of this

decision by this Court would, therefore, be limited to the specific factual considerations presented herein and would have little, if any, general application or impact.

CONCLUSION

In conclusion, Respondents respectfully submit that the Writ of Certiorari prayed for in this action should be denied because:

(1) No substantial federal question for resolution is presented in this action;

(2) The decision below rests in large part on long-established rules of Ohio substantive law; and

(3) The decision below turns upon facts so unique and so inconsequential that any decision by this Court in this case will have little precedential impact.

Respectfully submitted,

RICHARD R. HOLLINGTON, JR.
THOMAS M. SEGER
BAKER, HOSTETLER & PATTERSON
1956 Union Commerce Building
Cleveland, Ohio 44115
(216) 621-0200
Counsel for Respondents